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No. 82-167

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE CHAPPELL, *et al.*

Petitioners,

—v.—

VERNON WALLACE, *et al.*

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....iii

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE AND PROCEEDINGS BELOW..... 2

SUMMARY OF ARGUMENT..... 7

ARGUMENT..... 8

I. ARTICLE III COURTS MAY GRANT TRADITIONAL COMPENSATORY DAMAGE REMEDIES IN CONSTITUTIONAL CASES WITHIN THEIR JURISDICTION IN THE ABSENCE OF A CONGRESSIONAL INTENTION TO DEPRIVE THEM OF A PARTICULAR REMEDY 11

II. MILITARY OFFICIALS ARE NOT ENTITLED TO ABSOLUTE IMMUNITY FROM DAMAGE ACTIONS BY SUBORDINATES FOR THE WILLFUL VIOLATION OF ESTABLISHED CONSTITUTIONAL RIGHTS 30

Page

A. History Rejects the Grant of Absolute Immunity to Military Superiors for Willfully Unlawful Acts 34

B. Public Policy and Analogous Recent Precedent Reject the Grant of Absolute Immunity to Military Officials 35

1. The Effect of Qualified Immunity on the Issuance of Military Orders 37

2. The Burden of Defending in a Qualified Immunity Setting 39

3. The Effect of Qualified Immunity on a Serviceman's Obedience to Orders and the Morale and Trust of the Armed Forces.. 42

4. Qualified Immunity and the Function of a Military Superior.. 48

CONCLUSION 53

TABLE OF AUTHORITIES

Cases: Page

Alvarez v. Wilson, 431 F. Supp. 136 (N.D. Ill. 1977), app. pending, No. 81-2696 (7th Cir.).....41, 44

Barr v. Mateo, 360 U.S. 564 (1959).....32

Bates v. Clark, 95 U.S. 204 (1877).....36, 46

Birdwell v. Schlesinger, 402 F. Supp. 710 (D. Colo. 1975).....21

Bissell v. McElligott, 369 F.2d 115 (8th Cir. 1966), cert. denied 387 U.S. 917 (1967).....28

Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).....passim

Brown v. Glines, 444 U.S. 348 (1980).....15, 19

Burns v. Wilson, 346 U.S. 137 (1953).....18

Butz v. Economou, 438 U.S. 478 (1978).....passim

Calhoun v. United States, 475 F. Supp. 1 (S.D. Cal. 1977), aff'd, 609 F.2d 647 (9th Cir. 1979), cert. denied, 444 U.S. 1078 (1980).....21

Carlson v. Green, 446 U.S. 14 (1980).....passim

Davis v. Passman, 442 U.S. 228 (1979).....passim

Page

Dinsman v. Wilkes, 48 U.S. (7 How.) 83 (1849), on writ of error after new trial, 53 U.S. (12 How.) 390 (1851).....passim

Doe v. McMillan, 412 U.S.306 (1973).....48

Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866).....10

Ex Parte Young, 209 U.S. 123 (1908).....12

Feres v. United States, 340 U.S. 135 (1950).....passim

Flower v. United States, 407 U.S. 197 (1972).....15, 19

French v. Weeks, 259 U.S. 326 (1922).....18

Gilligan v. Morgan, 413 U.S. 11 (1973).....38

Greer v. Spock, 424 U.S. 828 (1976).....15, 19

Harlow v. Fitzgerald, ___ U.S. ___, 73 L.Ed.2d 396 (1982).....passim

Harmon v. Bruckner, 355 U.S. 519 (1958).....18

Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980).....24

Henderson v. Bluemink, 511 F.2d 399 (D.C. Cir. 1974).....28

Hiatt v. Brown, 339 U.S. 103 (1950).....18

Page

Hirabayashi v. United States, 320 U.S. 81 (1943).....10

Howard v. Lyons, 360 U.S. 593 (1959).....32

Imbler v. Pachtman, 424 U.S. 409 (1976).....39, 48

Jaffee v. United States, 663 F.2d 1226 (3rd Cir. 1981).....24

Laird v. Tatum, 408 U.S. 1 (1972).....39

Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982).....24

Little v. Barreme, 2 Cr. 170 (1804).....36, 47

Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982).....24

Luther v. Borden, 48 U.S. (7 How.) 1 (1848).....35

Middendorf v. Henry, 425 U.S. 25 (1976).....16

Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).....5

Mitchell v. Harmony, 54 U.S. (13 How.) 113 (1851).....36

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 431 U.S. 246 (1951) (Frankfurter, J., dissenting).....11

Page

Nixon v. Fitzgerald, ___ U.S. ___, 73 L.Ed.2d 349 (1982).....31

Orloff v. Willoughby, 345 U.S. 83 (1953).....18

Parisi v. Davidson, 405 U.S. 34 (1972).....18

Parker v. Levy, 417 U.S. 733 (1974).....18, 45

Pierson v. Ray, 386 U.S. 547 (1967).....31, 35

Procunier v. Martinez, 416 U.S. 396 (1974).....31, 47

Procunier v. Navarette, 434 U.S. 555 (1978).....39, 47

Scheuer v. Rhodes, 416 U.S. 232 (1974).....31, 35, 37, 38

Schlesinger v. Ballard, 419 U.S. 498 (1975).....19

Schlesinger v. Councilman, 420 U.S. 738 (1975).....9, 49

Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977).....24

Stump v. Sparkman, 435 U.S. 349 (1978).....48

Toth v. Quarles, 350 U.S. 11 (1955).....18

United States v. Brown, 348 U.S. 110 (1954).....24

Page

United States v. Lee, 106 U.S. 196 (1882).....26

Wood v. Strickland, 420 U.S. 308 (1975).....31

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).....12

Statutes:

U.S. Const., Art. III.....passim

10 U.S.C. § 41.....49

10 U.S.C. § 713.....49

10 U.S.C. § 719.....49

10 U.S.C. § 807.....46

10 U.S.C. § 809.....46

10 U.S.C. § 810.....46

10 U.S.C. § 813.....46

10 U.S.C. § 815.....46

10 U.S.C. § 833.....46

10 U.S.C. § 890.....42, 44, 45

10 U.S.C. § 934.....45

10 U.S.C. § 1552.....17

10 U.S.C. § 2114.....49

Page

28 U.S.C. § 1331.....13

38 U.S.C. § 11.....24

38 U.S.C. § 310.....24

38 U.S.C. § 311.....24

38 U.S.C. § 331.....24

42 U.S.C. § 1985(3).....3

50 U.S.C. App. § 501.....40

50 U.S.C. App. § 510.....40

U.S.C.M.J., Art. 90.....42

Other Authorities:

Comment, Free Speech in the Military, 53 N.Y.U.L.Rev. 1102 (1978).....49

Schleuter, The Court Martial, 89 Mil.L.Rev. 129 (1980).....43

Zilman and Imwikelreid, Constitutional Rights & Military Necessity, 50 Notre Dame Law. 396 (1976).....49

INTEREST OF AMICUS*

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the guarantees of racial fairness inherent in the Fifth Amendment. This case poses significant issues concerning the enforceability of basic constitutional guarantees of racial equality in a military setting. Since constitutional rights without adequate remedies are a mere form of words, the ACLU submits this brief amicus curiae in support of the historic powers of the Article III judiciary to grant traditional remedies to vindicate constitutional rights of persons in military service.

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*Written consents to the filing of this brief amicus curiae have been granted by all parties and have been lodged with the Court.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Plaintiff-respondents were black enlisted men on board the U.S.S. Decatur who allege that defendant-petitioners discriminated against them because of their race in regard to duty assignments, training and ratings that would enable them to advance, and advancement itself; and that these acts not only handicapped them in the Navy but in their potential employment opportunities in civilian life. (JA 3).[1]

The United States District Court for the Southern District of California dismissed the complaint, stating, "1. That the actions complained of are nonreviewable military decisions; 2. That public

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1. The affidavit and papers filed in support of a motion for a preliminary injunction also specified various instances of racial slurs and harassment (JA 21, 27-29, 30-31, 38).

policy compels that the defendants be entitled to intra-service immunity; 3. That the plaintiffs have failed to exhaust their administrative remedies.". (Pet. App. 22a). The Court of Appeals for the Ninth Circuit reversed. (JA 1a, 20a, 22a). The Ninth Circuit held, first, "that the district court erred in dismissing for failure to exhaust administrative remedies ... as the record reveals an apparent factual dispute" on this issue. (JA 3a, n.2). The Circuit Court suggested the submission of additional evidence on this issue before further proceedings in the district court, recognizing that exhaustion is a prerequisite for judicial review. (JA 7a, 10a-11a).

The Circuit Court construed respondents' right to bring an action under 42 U.S.C. § 1985(3) for a violation of equal protection as co-extensive with their right to bring an action pursuant to

Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). (JA 2a, n.1; 8a, n.5). It then considered whether Bivens-action review should be allowed for "claims arising incident to military service" concluding that "reviewability ... must reflect a careful balancing of policy considerations". (JA 5a-6a). As a basic limitation, the Court held that review must be confined to alleged violations of a "'recognized' constitutional right .... The allegations must amount to more than a traditional state court claim". (JA 10a, see also 7a and 9a, n.5). The Court pointed out that Feres v. United States, 340 U.S. 135 (1950), on which petitioner-defendants relied, was inapplicable to such a constitutional violation. (JA 13a, 16a, n.9).[2] In addition, adopting tests

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2. In the court below petitioners argued that under Feres they were entitled to absolute immunity (JA 13a); in this Court they rely on the case as a basis for disallowing a Bivens action. (Pet.Br. 17).

outlined in Mindes v. Seaman, 453 F.2d 197, 201-202 (5th Cir. 1971), the Court held that other factors in determining reviewability are "the nature of the plaintiff's interest and the potential injury to the plaintiff if review is withheld; ... the extent of interference with military functions; ... [and] the extent to which resolution of the claim requires military expertise." (JA 11a). Holding that respondents' claim of willful racial discrimination satisfied the Mindes tests, the Court rejected petitioners' claim of absolute immunity, relying on the opinion in Butz v. Economou, 438 U.S. 478 (1978) that though qualified immunity should be the general doctrine in regard to constitutional violations, there should be "an exception however, for cases in which absolute immunity 'is essential for the conduct of the public business.' 438 U.S. at 507 ... " (JA 12a).

In considering whether such an exemption should be made for the military, the Ninth Circuit noted:

> In Dinsman v. Wilkes, 53 U.S. (12 How.) 390, 13 L.Ed. 1036 (1851), the Supreme Court allowed only qualified immunity from liability in connection with an internal military decision .... The reference in Economou to Dinsman*, 438 U.S. at 492-94, 98 S.Ct. at 2903-2904, indicates that the fact that the constitutional claim was incident to military service would not necessarily preclude recovery. (JA 13a-14a) (footnote omitted).

The Court concluded that "creating an exception to those two holdings" (JA 14a) by affording absolute immunity, was unwarranted for "military decisions made in a noncombat setting in peacetime." (JA 15a, 16a n.10).

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*The Economou opinion referred to Wilkes v. Dinsman, 48 U.S. (7 How) 83, 131 (1849), the Court's first opinion in the case, which arose again in 1851 on writ of error after new trial, 53 U.S. (12 How.) 390 (1851).

SUMMARY OF ARGUMENT

Since respondents allege a classic violation of a clearly established constitutional right, this case falls within the subject matter jurisdiction of a federal district court, which is presumptively empowered to grant traditional remedies, including compensatory damages, to vindicate constitutional rights. No basis exists to suggest that Congress wishes to deny the federal courts traditional remedial powers in constitutional cases involving military officials, since Congress has granted jurisdiction to federal courts to enforce constitutional rights in the military in other contexts. Congress' decision to rely on a no-fault mechanism for compensating military tort victims does not imply a desire to preclude Article III courts from entertaining damage claims in cases alleging a violation of an established constitutional right for which no clear

tort analogue exists. Finally, no basis exists for a blanket grant to military officials of absolute immunity from damages for violating constitutional rights. A qualified immunity is sufficient.

ARGUMENT

INTRODUCTORY STATEMENT

This case poses the question of whether a member of the armed forces of the United States may, in time of peace and in a non-combat setting, seek redress in an Article III court for damages suffered as a result of willful racial discrimination allegedly[3] inflicted upon him or her by a superior in violation of the Fifth Amend-

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3. Since the district court dismissed respondent's complaint on its face, the factual allegations of the complaint which allege willful racial discrimination must be taken as true at this stage of the litigation.

ment.[4] The Solicitor General argues that no Article III remedy is available to a military victim who has been injured by willful racial discrimination, first, because Congress has not explicitly authorized an Article III court to entertain a constitutional damage claim against a military defendant and, second, because military officials are entitled to absolute immunity from damage actions by subordinates for unconstitutional conduct.[5]

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4. The case does not challenge the requirement that military remedies be exhausted. Cf. Schlesinger v. Councilman, 420 U.S. 738 (1975). Since a serious factual question appears to exist as to whether plaintiffs have exhausted their military remedies, plenary review by this Court of an important issue of law touching on the relation between military and civilian authority may well be premature.

5. In the lower courts, the government's principal argument was based on an assertion of absolute immunity. In this Court, the emphasis has been shifted to whether an Article III court may entertain a damage claim against a military official for unconstitutional behavior in the absence
(footnote continued on following page)

Neither contention can withstand analysis.

The basic principle underlying the decision of the court below is unarguable: the supremacy of constitutional rights over military discretion and of civilian over military authority. See Hirabayashi v. United States, 320 U.S. 81 (1943); Ex parte Milligan, 71 U.S. (4 Wall.) 2, 21-28 (1866); see also, Davis v. Passman, 442 U.S. 228, 242 (1979): "justiciable constitutional rights are to be enforced through the courts ... unless such rights are to become merely precatory..."

In the instant case the only method for judicial vindication of the Fifth Amendment guarantee of equal protection

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(footnote continued from preceding page) of explicit congressional authorization. It does not appear, however, that the government argued the Bivens issue in the court below, raising a question as to the jurisdiction of this Court to consider it. Harlow v. Fitzgerald, - U.S. - 73 L.Ed 396, 411, n.36 (1982).

against racial discrimination is an action for damages against the officials who allegedly committed the constitutional violation. The situation is the same as that in Davis: "...[T]here are available no other alternative forms of judicial relief. For Davis as for Bivens, 'it is damages or nothing'". Davis, supra, 442 U.S. at 245. See also Harlow v. Fitzgerald, 73 L.Ed.2d 396, 407-8 (1982) ("an action for damages may offer the only realistic avenue for vindication of constitutional guarantees").

I. ARTICLE III COURTS MAY GRANT TRADITIONAL COMPENSATORY DAMAGE REMEDIES IN CONSTITUTIONAL CASES WITHIN THEIR JURISDICTION IN THE ABSENCE OF A CONGRESSIONAL INTENTION TO DEPRIVE THEM OF A PARTICULAR REMEDY.

As Justice Frankfurter noted in Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 261 (1951)(Frankfurter, J., dissenting):

> "Courts, unlike administrative agencies, are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies ..."

Accordingly, where Congress has granted a federal district court subject matter jurisdiction over a claim arising under the Constitution,[6] this Court has repeatedly recognized judicial power to grant a successful litigant the "familiar remedies" of prohibitory injunction[7] and compensatory damages.[8] Thus, in Bivens,

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6. Jurisdiction is conferred by 28 U.S.C. § 1331. See Davis v. Passman, 442 U.S. 228, 231 (1979).

7. Ex parte Young, 209 U.S. 123 (1908) and Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) are, perhaps, the two most celebrated grants of prohibitory injunctions in the absence of congressional authorization. In each case, subject matter jurisdiction was granted by 28 U.S.C. § 1331. In each case, the cause of action for equitable relief was premised directly on the Constitution.

8. See generally Bivens v. Six Unknown Agents, 403 U.S. 388 (1971); Davis v.
(footnote continued on following page)

this Court recognized that Article III courts were empowered to award compensatory damages to plaintiffs who properly invoked their subject matter jurisdiction and who proved that federal officials had injured them in violation of the Fourth Amendment. Similarly, in Davis v. Passman, this Court ruled that federal courts were empowered to award damages against a member of Congress who was alleged to have discriminated on the basis of sex in violation of the Fifth Amendment. Finally, in Carlson v. Green, this Court upheld the power of a district court to award damages to a federal prisoner who was injured in violation of the Eighth Amendment. In each of Bivens, Davis and Carlson, federal

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(footnote continued from preceding page) Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980).

defendants earnestly argued that the lack of an explicit congressional statute authorizing an award of compensatory damages precluded the grant of relief. In each case, however, this Court rejected the attempt to blur the classic distinctions among subject matter jurisdiction, cause of action and remedial power which are central to the Bivens analysis. Where an Article III court is vested with uncontested subject matter jurisdiction and where, as here, a plaintiff has pleaded facts which, if true, make out an established constitutional cause of action, the government's suggestion that the "familiar remedy" of compensatory damages is unavailable in federal court must rest on more than an invocation of a talismanic immunity of the military from judicial

review.[9] Indeed, of all the institutions in American life, none is in greater need of a degree of judicial review to assure that the necessary application of military discipline does not degenerate into lawless tyranny. Where a plaintiff must exhaust military remedies before seeking judicial redress of his constitutional

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9. The government carefully refrains from discussing the question of whether a federal court would be empowered to enjoin racially discriminatory activity by the military. Presumably, even the Solicitor General would recognize the power of the Article III judiciary to enjoin a return to racially segregated military installations. In fact, Article III courts routinely entertain claims for equitable relief from allegedly unconstitutional military activity. E.g. Flower v. United States, 407 U.S. 197 (1972); Brown v. Glines, 444 U.S. 348 (1980); Greer v. Spock, 424 U.S. 828 (1976). While this Court was sympathetic to the substantive positions argued by the military in Brown and Greer, no question was raised as to the power of a federal court to grant equitable relief. If, as Justices Brennan and Harlan noted in Bivens, a federal judge is empowered to issue injunctive relief to enforce a litigant's constitutional claim, it is difficult to understand why the other traditional remedy -- compensatory damages -- is not also available. 403 U.S. at 396-97, 404.

grievances,[10] and where relief is confined to established constitutional claims raised in peacetime and in a non-combat setting, a traditional compensatory damage remedy does not threaten any legitimate military interest, while preserving the minimum degree of constitutional enforcement necessary to the continued existence of the rule of law.

Far from indicating hostility to judicial enforcement of constitutional standards in the military, Congress has consistently recognized that Article III courts should exercise final authority

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10. Requiring exhaustion of administrative remedies as a precondition to a Bivens claim is, itself, a major accomodation to military necessity, since constitutional litigants are not required to exhaust administrative remedies prior to suit.

Since respondents claim to have exhausted their military remedies, the extent to which exhaustion is required is not an issue in this case.

over military activity which impinges upon constitutional rights.

First, Congress has provided for an internal review mechanism culminating in the Board for the Correction of Naval Records, the decisions of which are reviewable in Article III courts. See 10 U.S.C. § 1552; 32 C.F.R. 723. While the limited remedies available before the Board do not provide an adequate substitute for a Bivens remedy,[11] congressional provision for Article III review of the Board's findings evidences a clear recognition that internal military resolution of serious legal claims should be subject to a degree of civilian judicial review.

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11. The Board is authorized to grant back pay awards, but not compensatory damages generally. See Carlson v. Green, supra.

Second, Congress has long provided for habeas corpus review of military decisions affecting constitutional rights. E.g. Burns v. Wilson, 346 U.S. 137 (1953); Parker v. Levy, 417 U.S. 733 (1974); Orloff v. Willoughby, 345 U.S. 83 (1953); Toth v. Quarles, 350 U.S. 11, 22 (1955); Harmon v. Bruckner, 355 U.S. 579 (1958); Parisi v. Davidson, 405 U.S. 34, 44 (1972); Middendorf v. Henry, 425 U.S. 25, 38, 44 (1976); Hiatt v. Brown, 339 U.S. 103 (1950). A serviceman's redress against his superior for violation of a constitutional right is consistent with holdings that the courts limit review of military decisions to the question of whether the military was acting within its lawful authority (see Pet. Br. 18-20; French v. Weeks, 259 U.S. 326 (1922) as to this limitation). For, an unconstitutional act must be "viewed as not authorized" (Butz v. Economou, 438 U.S. 478, 490-91

(1978)). While Article III courts, in exercising habeas corpus review over the military, have been cautious in deferring to military expertise in non-constitutional settings, it is clear that Congress, in granting habeas corpus jurisdiction, has vested the Article III judiciary with the power and the duty of assuring that the Constitution is respected within the armed forces.

Third, Congress has provided for Article III review of the constitutionality of military activity pursuant to the traditional mechanism of actions for injunctive relief directed at an allegedly unconstitutional military decision. E.g. Flower v. United States, 407 U.S. 197 (1972); Brown v. Glines, supra; Greer v. Spock, supra. Schlesinger v. Ballard, 419 U.S. 498 (1975).

Since Congress has vested the Article III courts with explicit power to review the Board for the Correction of

Naval Records and with habeas corpus and federal question jurisdiction over the military in constitutional cases, the Solicitor General can hardly argue that Congress has expressed an intent to preclude the federal courts from performing their traditional role as guardians of the Constitution in this case merely because the defendant happens to be a member of the armed forces. Instead, the Solicitor General seeks to draw a false analogy between tort law and constitutional law in arguing that Feres v. United States, 340 U.S. 135 (1950) precludes the recognition of a Bivens claim against a military superior. Feres is not, however, authority for precluding an action against an individual military defendant for damages flowing from the violation of an established constitutional right to be free from willful racial discrimination.

The decisions dismissing suits for damages by servicemen against their superiors (cited in Pet. Br. 14-15, 37) are consistent with the decision of the court below and maintenance of a Bivens action herein. This body of cases consists of personal injury tort actions, typified by Calhoun v. United States[12] (cited in Pet. Br. 15), discussed with approval by the court below. (Pet. Br. 9a-10a).

The Court recognized that Calhoun and similar cases expressed an "understandable concern that a clever pleader can often transform the most innocuous

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12. 475 F. Supp. 1 (S.D. Cal. 1977), aff'd, 604 F.2d 647 (9th Cir. 1979) (adopting opinion of district court), cert. denied, 444 U.S. 1078 (1980). The exception to the statement in the text as to the petitioners' citations, is Birdwell v. Schlesinger (Pet. Br. 15), which dismissed an action for damages for a discharge from the Air Force but which, contrary to petitioners' implication, accorded the commandant only qualified immunity. 402 F. Supp. 710, 718 (D. Colo. 1975).

state tort action into a claim of constitutional status" (Pet. App. 10a).[13] To meet this problem it held that only a "'recognized' constitutional right" could ground a reviewable claim; and that "the allegations must amount to more than a traditional state law claim" (Pet. App. 10a). Without violence to the intent of the court below but utilizing this Court's subsequent language in Harlow v. Fitzgerald, supra, the criterion of a valid cause of action should be reworded to include an alleged violation of a "clearly established ... constitutional right." (73 L.Ed.2d at 410).

The reason for concern about artful pleading of a constitutional injury rather

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13. Compare Davis, 442 U.S. at 248: the Bivens plaintiff "must first demonstrate that his constitutional rights have been violated. We do not hold that every tort by a federal official may be redressed in damages."

than merely a tort, is that this device would circumvent the rule in Feres v. United States, 340 U.S. 135 (1950). Feres is uniformly deemed applicable to suits against other servicemen as well as suits against the United States under the FTCA (see cases cited by Pet. Br. 14-15, and decision of court below, Pet. App. 13a; 15a-16a, n.9).

Saying that the Federal Tort Claims Act "should be construed to fit ... into the entire statutory system of remedies against the Government ... " (340 U.S. at 139), the Feres Court stressed Congress' establishment of a system of benefits specifically for those in the armed services (340 U.S. at 144) -- a compensation system viewed as reasonable. (340 U.S. at 145).[14]

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14. No-fault compensation by the United States to servicemen, veterans and their survivors for any disability suffered "in
(footnote continued on following page)

However, racial discrimination against a serviceman is not compensable or remediable under the Veterans Benefit Act or any other legislation, nor does it give rise to a traditional tort action. For these reasons as well as the irrelevance to a constitutional claim of the other considerations in Feres (see summary of Feres by court below, Pet. App. 15a-16a, n.9)[15] the

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(footnote continued from preceeding page)
the line of duty" (38 U.S.C. §§ 11, 310, 321,331, ff.), has been emphasized in a number of the cases dismissing complaints against military superiors, cited by petitioners. E.g., Jaffee v. United States (Pet. Br. 14), 663 F.2d 1226, 1237 (3rd Cir. 1981); Laswell v. Brown (Pet. Br. 14) 683 F. 2d 261 (8th Cir. 1982) at ; Lombard v. United States (Pet. Br. 15) 690 F.2d 215, 220-21 (D.C. Cir. 1982). See also Hatzlachh Supply Co. v. United States, 444 U.S. 460, 464 (1980).

15. The dictum relating Feres to military discipline originated in United States v. Brown, 348 U.S. 110, 112 (1954), where it was used to distinguish Feres and permit FTCA recovery to a prisoner. In Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 672-73 (1977), (Marshall, J. dissenting), denying a third-party claim against the United States for
(footnote continued on following page)

ruling of the court below is entirely consistent with Feres.

The court below's exclusion from Bivens actions of "a traditional state law claim" and inclusion of only a "recognized" (or clearly established) constitutional right, not only prevents circumvention of Feres but also is likely to exclude claims whose determination may require military expertise -- such as claims based on injuries incurred in training or maneuvers. And claims arising in "a combat setting" are entirely excluded from the ruling below (Pet. App. 16a, n.10).[16]

(footnote continued from preceding page) negligence in the manufacture of military planes, Justice Marshall noted that third-party recovery would, equally with a direct suit against the United States, involve "second-guessing military orders" and intra-military testimony. However, it must be observed that these occurrences are routine in court martials, which are a regular part of military affairs.

16. The court below also ruled that one factor determining reviewability is "the extent to which resolution of the claim requires military expertise." (Pet.App. 11a).

In sum, a Bivens-action is appropriate because the court below established a feasible limitation to prevent abuse of this critical method of redressing the violation of the established constitutional rights of servicemen by their superiors.

Moreover, as this Court has made clear since United States v. Lee, 106 U.S. 196 (1882), sovereign immunity does not shield a government employee who acts beyond the scope of his constitutional powers. Such an employee acts, not as an agent of the sovereign, but as an individual. Thus, in the case of constitutional violations by a military official, Feres and the Federal Tort Claims Act are irrelevant because the individual defendant has no sovereign immunity to waive. Whatever the validity of Feres in the tort area (where an alternative no-fault scheme was available), the paramount importance of vindicating constitutional rights, argues

strongly in favor of judicial enforcement of constitutional rights in this case.

Finally, and most tellingly, Feres did not purport to bar all tort suits against military defendants -- merely actions against the United States. While traditional sovereign immunity doctrine grants an individual government defendant the cloak of sovereign immunity in many tort settings, no such cloak is available to an official defendant charged with unconstitutional, as contrasted with merely tortious activity; or to a defendant charged with willful tortious activity clearly beyond the scope of his official duties. In such cases, the governing rule in cases against military superiors is not to be found in Feres or the Federal Tort Claims Act, but in Wilkes v. Dinsman, 48 U.S. (7 How.) 83 (1849), (on writ of error after new trial) 53 U.S. (12 How.) 390 (1851), which recognizes the existence of a claim against a military superior for willful tortious

behavior beyond the scope of his official duties. See also Henderson v. Bluemink, 511 F.2d 399, 403-404 (D.C. Cir. 1974); Bissell v. McElligot, 369 F.2d 115 (8th Cir. 1966), cert. denied 387 U.S. 917 (1967).

Thus, Congress' desire to avoid intra-military negligence actions in the wake of the Federal Tort Claims Act does not provide persuasive authority for denying a federal court power to remedy violations of a constitutional magnitude. If, as Wilkes v. Dinsman holds, a claim for willfully tortious activity would lie, there can be no justification for refusing to redress similarly willful activity which violates not merely the law of torts, but the non-discrimination provisions of the Constitution itself.

The government's lame attempt to distinguish Wilkes v. Dinsman is singularly unpersuasive. First, the government argues, Wilkes involved a tort, not a constitutional claim. Of course, such an observation merely strengthens Wilkes,

since vindication of constitutional rights would seem more compelling than enforcing a tort remedy. Second, the government argues, the military was smaller when Wilkes was decided and fewer internal remedies existed. The need for constitutional enforcement mechanisms would, however, seem directly proportionate to the size of the military establishment. Thus, far from arguing for the abolition of Wilkes v. Dinsman, the size and power of the current American military establishment argues for its retention. Moreover, as this Court noted in Carlson v. Green, the existence of alternative remedies are relevant to a Bivens analysis, but only if they are of equivalent scope. Not even the Solicitor General argues that internal military remedies are the equivalent of an Article III action for damages. Finally, the government argues that while the Wilkes Court recognized

an "ancient common law" remedy, the Ninth Circuit created a "new" remedy. Such an argument misperceives the Ninth Circuit's decision. Surely, there is nothing new about the principle that racial discrimination is forbidden by the Constitution. Nor is there anything new about using compensatory damages to right legal wrongs. The Ninth Circuit merely applied traditional remedies to traditional legal principles. If there is anything new in this case, it is the Solicitor General's determined attempt to place the military above the constitutional law of the land.

II. MILITARY OFFICIALS ARE NOT ENTITLED TO ABSOLUTE IMMUNITY FROM DAMAGE ACTIONS BY SUBORDINATES FOR THE WILLFUL VIOLATION OF CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS.

With the sole exception of the President of the United States, this Court has consistently refused to grant execu-

tive officials absolute immunity from damage actions for the violation of clearly established constitutional rights. Compare Nixon v. Fitzgerald, __U.S.__, 73 L.Ed.2d 349 (1982) (describing unique status of President) with, e.g. Harlow v. Fitzgerald, 73 L.Ed. 396 (1982)(denying blanket absolute immunity to White House aides); Scheuer v. Rhodes, 416 U.S. 232 (1974)(Governor, National Guard officials); Butz v. Economou, 438 U.S. 478 (1978)(cabinet officials); Procunier v. Martinez, 416 U.S. 396, 406 (1974)(prison officials); Pierson v. Ray, 386 U.S. 547 (1967)(police officers); Wood v. Strickland, 420 U.S. 308 (1975)(educational officials); Davis v. Passman, 442 U.S. 228 (1979)(members of Congress as employers). "For executive officials ... qualified immunity presents the norm." Harlow v. Fitzgerald, 73 L.

Ed.2d 396, 403 (1982).[17] Petitioners seek a dramatic and potentially dangerous exception from the norm on behalf of military officials in seeking to "bear the burden of showing that public policy requires ... absolute exemption from personal liability for [their] unconstitutional conduct" towards their subordinates. See Butz v. Economou, 438 U.S. 479, 506 (1978).[18]

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17. As defined in Harlow, a qualified immunity shields an individual defendant from liability so long as a reasonable person would not have been expected to know that his conduct violated constitutional norms.

18. In Butz (438 U.S. at 489-91), the Court explained that the grant of absolute immunity to certain executive officials in Barr v. Matteo, 360 U.S. 564 (1959), was not intended to insulate an official who acted beyond a "constitutional limitation on his authority". 438 U.S. at 489. Compare Feres v. United States, discussed supra at pp. 22-28 with Barr v. Matteo, supra. Thus, while military officials may well enjoy an absolute immunity in certain tort cases, no similar immunity exists in a constitutional case. Barr was applied to a military commandant in Howard v. Lyons, 360 U.S. 593, 597 (1959).

Casting petitioners' argument in terms of this Court's immunity decisions, petitioners contend that a military superior's potential liability in damages for the willful violation of an established constitutional right would cause him to hesitate in the issuance of valid orders; and that such hesitation would be more detrimental to the public than hesitation by other officials because of the military's function (see Pet. Br. 21-25).[19] In addition, petitioner argues that the existence of a damage remedy for willful violations of the Constitution would impede the existence of a relationship of trust and discipline necessary to the maintenance of an effective fighting force. However, whether one approaches the issue from the perspective of history, public policy, ana-

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19. The military function at issue in this appeal excludes activity in a "combat setting." (Pet. App. 16a, n.10).

lagous precedent or functional analysis, no basis exists for granting absolute immunity to the military establishment for the willful violation of a serviceman's constitutional rights.

A. History Rejects The Grant Of Absolute Immunity To Military Superiors For Willfully Unlawful Acts.

In Wilkes v. Dinsman, 48 U.S. (7 How.) 83 (1849), on writ of error after a new trial, 53 U.S. (12 How.) 390 (1851), the Supreme Court sustained the validity of a complaint for damages filed by an American sailor alleging that he had been unlawfully flogged by his superior officer while on the high seas.[20] The recognition in Wilkes

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20. Although the complaint in Wilkes v. Dinsman was couched as a common law tort, it is apparent that, were it filed today, it would make out a claim under the Eighth Amendment as well. See Carlson v. Green, supra. The Court declined to dismiss the complaint in Wilkes despite the acquittal of Captain Wilkes by a court martial.

v. Dinsman that military superiors who willfully[21] exceed the limits of their lawful authority may not plead official immunity is fully consistent with the classic evolution of executive immunity in related contexts involving law enforcement officials. See, e.g. Scheuer v. Rhodes, supra; Pierson v. Ray, supra. Moreover, Wilkes was not an isolated phenomenon. Thus, in Luther v. Borden, 48 U.S. (7 How.) 1, 61 (1848), this Court noted that military authority:

> cannot, without liability to a private suit in the judicial tribunals, be exercised on a soldier himself for a cause not military or over which the officer has no right to order him. (emphasis added)(citing both English and American Precedents).

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21. Chief Justice Taney ruled that Dinsman could recover if Wilkes had acted from "malice or a vindictive feeling". 53 U.S. at 404. See also 48 U.S. (7 How.) 88, 122 (1849). Phrased in modern terms, Captain Wilkes enjoyed only a qualified immunity for good faith acts.

Similarly, in Bates v. Clark, 95 U.S. 204, 209 (1877), a military officer was deemed liable in damages despite a defense that he was merely acting in accordance with a superior's orders. Finally, in Mitchell v. Harmony, 54 U.S. (13 How.) 113, 134-35 (1851), a military official was deemed personally liable for an unjustified seizure of property during deployment against the enemy in enemy territory, unless he had "reasonable grounds for believing that the peril is immediate." See also Little v. Barreme, 2 Cr. 170 (1804). Thus, as the Ninth Circuit noted below, no historical precedent exists to support a claim for absolute immunity for military officials.

B. Public Policy And Analagous Recent Precedent Reject The Grant Of Absolute Immunity To Military Officials.

1. The Effect of Qualified Immunity on the Issuance of Military Orders

Petitioners argue that continued recognition of the historic existence of a qualified, as opposed to an absolute, immunity for military officials would unduly inhibit the issuance of necessary military orders. However, from the standpoint of inhibiting the issuance of valid orders, the question of immunity for officials with sensitive public safety functions was resolved by Scheuer v. Rhodes, 416 U.S. 232 (1974). In Scheuer the Governor, Adjutant General of the National Guard, and other National Guard officers, were accorded only a qualified immunity from liability for injuries suffered when guardsmen were deployed and ordered to fire their guns during an alleged

civil disturbance. The Court pointed out: "In common with police officers ... officials must often act swiftly and firmly ... when a condition of civil disorder in fact exists, there is obvious need for prompt action" with regard to "the decision to invoke military power." (416 U.S. at 246).[22]

If orders issued by the Governor and the National Guard during a civil disturbance are entitled to merely a qualified immunity, it is difficult to understand why military orders issued in peacetime and in a non-combat setting should be accorded the drastic protection of absolute immunity. In short, Scheuer is the modern analogue of Wilkes v. Dinsman and is dispositive of the immunity issue in this case.

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22. And see Gilligan v. Morgan, 413 U.S. 1, 11 (1973) as to the National Guard's possible "accountability in a judicial forum ... by way of damages ... ".

As to other instances of qualified immunity in spite of circumstances in which quick and firm orders are necessary for the public safety, see Imbler v. Pachtman, 424 U.S. 409, 430 (1976), and Butz, supra, 438 U.S. at 501 (policemen);[23] Carlson v. Green, 446 U.S. 14, 19 (1980) (prison officials): "even if requiring them to defend respondent's suit might inhibit their efforts to perform their official duties, the ... qualified immunity .... provides adequate protection "; Procunier v. Navarette, 434 U.S. 555 (1978) (prison officials).

2. The Burden of Defending in a Qualified Immunity Setting

Petitioners contend, as well, that the burden of defending unwarranted constitutional claims argues strongly for the creation of an absolute immunity for

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23. In civil disorders, the Armed Forces performed the same functions as the police. See Laird v. Tatum, 408 U.S. 1, 5 (1972).

military officials. However, respondents' recognition that internal military remedies must be exhausted and the exclusion of "combat settings" from the decision below, eliminates the "burden" issue as a serious factor. There is no reason to believe that the time pressures on military officials in peacetime are more onerous than those borne by other government officials, such as prison officials and policemen who have been denied absolute immunity by this Court.[24] In addition, the newly reinforced summary judgment procedure on the existence of a qualified immunity defense will expedite the determination of insubstantial

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24. Under current guidelines, the government bears the burden of defending Bivens actions against individual government defendants, including members of the military.

cases.[25] See Harlow, supra, 73 L.Ed.2d at 396 , Pet. App. 17a.

In petitioners' fear of the number of unwarranted suits that might ensue from the ruling of the court below (Pet. Br. 23-24), they overlook the significant restraint on litigation imposed by the nature of military life and the impossibility of leaving it at will. The antagonism likely to be engendered towards the serviceman who files suit against his superior and the many ways in which it can be manifested in the enclave of a vessel or base acts as a potent deterrent to frivolous litigation. (See JA 26-39):

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25. Cf. Alvarez v. Wilson, 431 F. Supp. 136, 145 (N.D. Ill. 1977) App. pending, No 81-2696 (7th Cir.): affidavits fail to establish good faith of administrator and psychiatric evaluation of a "Black-Puerto Rican" assertive member of the base's human relations committee, who was released by hospital psychiatrists with a report of no psychiatric disability.

alleged harassment and racial slurs towards plaintiff-respondents). Further, the "lack of time and money" to retain an attorney and pay other litigation costs (see Feres, supra, 340 U.S. at 145) is another realistic impediment.

3. The Effect of Qualified Immunity on a Serviceman's Obedience to Orders and the Morale and Trust of the Armed Forces.

Petitioners suggest that a refusal to cloak military supericrs with absolute immunity would encourage disobedience to orders. U.S.C.M.J. Art. 90; 10 U.S.C. § 890. The fact that the unlawfulness of an order is a recognized defense to a court martial proceeding has not impaired military discipline. Indeed, it has acted as a necessary restraint which reinforces the effectiveness of our military forces.[26]

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26. The effort to increase the sense of justice and fair treatment in the military has stimulated dramatic reform of
(footnote continued on following page)

Similarly, recognition that military superiors are not above the Constitution can only serve to strengthen the effectiveness and will of a free people's defense forces. Indeed, it is difficult to understand how immunizing military officials from damages for willful racial discrimination would aid the sense of mutual trust and confidence which is a prerequisite of any effective fighting force.[27]

(footnote continued from preceding page) the court martial procedure over a fifty year period. See Schleuter, The Court Martial, 89 Mil. L. Rev. 129, 156, 165 (1980).

27. Only a qualified immunity for acts performed in good faith was accorded a congressman in a suit by his employee for an unconstitutionally discriminatory discharge, despite the special relationship of confidence and loyalty between a congressman and his employee. Davis v. Passman, 442 U.S. at 249 (Burger, C.J., dissenting).

Lingering vestiges of racism weaken us as a nation -- and weaken our armed forces as its shield. Elimination of the only judicial remedy available to a serviceman who is the victim of willful racial discrimination hardly serves to improve the morale and trust within the military. See Alvarez v. Wilson, 431 F. Supp. 136, app. pending, No. 81-2696 (7th Cir.).

Moreover, in view of the immediate consequences for disobedience to an order that can be imposed under the Uniform Code of Military Justice, the distant possibility of a lawsuit against a superior could not have an appreciable effect of military discipline.

Disobedience of a superior's order, punishable by death in wartime, is punishable by any punishment a court martial directs, except death, in peacetime; (10 U.S.C. § 890) also punishable are "all

disorders and neglects to the prejudice of good order and discipline in the armed forces." (10 U.S.C. § 934).[28] The code specifies no limit on the allowable period of a suspect serviceman's confinement after arrest, either before arraignment or before trial, nor does it provide for bail; during confinement the prisoner can be segregated and subject to "minor pun-

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28. See Parker v. Levy, 417 U.S. 733 (1974) upholding constitutionality of § 934. Levy was sentenced to 3 years confinement at hard labor and other penalties (417 U.S. at 736) for violation of the above-quoted sections and the section prohibiting conduct unbecoming an officer and a gentleman.

Assuming arguendo that discipline might be affected by the possibility of a damage suit, the exclusion of orders in a "combat setting" from the ruling below (Pet. App. 16a, n.10) implements the greater significance attributed to wartime than to peacetime obedience to orders in 10 U.S.C. 890.

ishment" for infractions of discipline; a serviceman attached to a vessel is subject, at a commanding officer's discretion, to non-judicial punishment (without the option of court martial), which can include seven days confinement (10 U.S.C. §§ 807, 809, 810, 813, 815, 833).

In the context of the compulsion towards obedience exerted by the military justice system, it is clear why the Court in Dinsman, supra, treated as entirely consistent its emphasis on the serviceman's obligation to obey all orders (see 53 U.S. at 403-404) and his superior's qualified liability to him for damages.[29] See Bates v. Clark, 95

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29. Civilians receiving police directions on the streets or highways are accustomed to the reaction that yielding even to an invalid order will be less burdensome than courting arrest and litigation by disobedience; for a serviceman the results of an arrest for insubordination are much more fearsome.

U.S. 204, 209 (1877) where an officer was held liable for damages regardless of his claim that he issued his order in accordance with his duty to obey superior orders; and Little v. Barreme, supra.

The need in a prison for the prisoners' obedience to orders and conformity with regulations is analagous to that need in the Armed Forces. Nevertheless, the Court believes that only qualified immunity for prison officials from damages suits by inmates is required. See Procunier v. Martinez 416 U.S. 396, 406 (1974) referring to the "tension between the traditional policy of judicial restraint regarding prisoner complaints and the need to protect constitutional rights"; Procunier v. Navarette, 434 U.S. 555 (1978); Carlson v. Green, 446 U.S. 14 (1980).

4. Qualified Immunity and the Function of a Military Superior

This Court has consistently refused to extend an absolute immunity to an official whose function did not require it. E.g. Butz v. Economou, 438 U.S. at 506, 515; Imbler v. Pachtman, 424 U.S. 490, 430 (1976), Doe v. McMillan, 412 U.S. 306, 317, 319, 320 (1973); Stump v. Sparkman, 435 U.S. 349 (1978). The Ninth Circuit below recognized that the function performed by a military commander in a combat setting might well require an absolute immunity from damage claims. However given the myriad functions performed by our peacetime military establishment in a non-combat setting, a grant of blanket absolute immunity to all military supervisors has never been the law.

See, e.g. Henderson v. Bluemink, 511 F.2d 399, 403-404 (D.C. Cir. 1974) (army doctor). The military has "become a multi-million person employer involved in almost every aspect of American life." See Zilman and Imwikelreid, Constitutional Rights and Military Necessity, 50 Notre Dame Law.396, 400 (1976); see also Comment, Free Speech in the Military, 53 N.Y.U. L.Rev. 1102, 1114 (1978).[30] Indeed, members of the armed forces, including many who perform duties identical to those ordinarily performed by civilians, are subject to military orders about their conduct even in their own homes in the civilian community. See Schlesinger v. Councilman, 420 U.S. 739 (1975).

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30. As to the variety of duties performed by the military, see, e.g. 10 U.S.C. § 41 (appointment of officers to Military Staff Committee of the United Nations); 10 U.S.C. § 719 (members of Armed Forces detailed for duty in Department of Commerce); 10 U.S.C. § 2114 (medical students supported by Defense Department appointed as officers); 10 U.S.C. § 713 (members of Armed Forces to inspect State Department buildings).

No basis exists for suggesting that the vast bulk of military officials perform functions which require the extraordinary shield of absolute immunity. To suggest that a Motor Pool Sergeant or a Mess Officer is called upon to perform functions comparable to those performed by the President of the United States or a sitting judge is ludicrous. In the vast bulk of settings, a grant of qualified immunity fully satisfies any legitimate concern for military efficiency and function.

Moreover, unlike the President and sitting judges, who have been afforded absolute immunity, no effective alternative mechanism operates to assure compliance with constitutional norms in a military setting. By definition, military society is often geographically, psychologically, and physically remote from civilian life. The safeguards of

public scrutiny and formal review which may be counted upon to assure compliance with constitutional norms in many areas of civilian life are simply not present in many -- perhaps most -- military settings.

The grant of absolute immunity to military officials would affect literally millions of individuals. Unlike a narrow grant of absolute immunity to a discrete category of officials based upon a careful functional analysis, a blanket grant of immunity to all military officials would create an enormous loophole in the Constitution, justified by neither history, policy nor functional analysis.

CONCLUSION

For the above-stated reasons, the judgment of the Court of Appeals should be affirmed.

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